FEDERAL COURT OF AUSTRALIA

Bazzi v Dutton [2022] FCAFC 84

Appeal from:	*Dutton v Bazzi* [2021] FCA 1474
File number(s):	NSD 1333 of 2021
Judgment of:	**RARES, RANGIAH AND WIGNEY JJ**
Date of judgment:	17 May 2022
Catchwords:	**APPEAL AND NEW TRIAL** – test for determining whether primary judge erred in finding ordinary reasonable reader would understand defamatory publication conveyed imputation – whether appellant must demonstrate error in finding of fact or error in exercise of discretionary judgment – whether *obiter dicta* in *Gatto v Australian Broadcasting Corporation* [2022] VSCA 66 correct – *Held:* test is whether error of fact established **DEFAMATION –** where matter complained of was tweet – whether ordinary reasonable reader would understand tweet read as a whole and in way users of Twitter read tweets conveyed imputation – where primary judge used dictionaries to interpret imputations and matter complained of – *Held:* appeal allowed
Legislation:	*Federal Court of Australia Act 1976* (Cth) s 27 *Defamation Act 2005* (NSW) s 31
Cases cited:	*Bailey v WIN Television NSW Pty Ltd* (2020) 104 NSWLR 541 *Chau v Australian Broadcasting Corporation* (2021) 386 ALR 36 *Dutton v Bazzi* [2021] FCA 1474 *Fleming v Advertiser-News Weekend Publishing Co Pty Ltd* [2016] SASCFC 109 *Gatto v Australian Broadcasting Corporation* [2022] VSCA 66 *Kemsley v Foot* [1952] AC 345 *Lee v Lee* (2019) 266 CLR 129 *Lesses v Maras* (2017) 128 SASR 292 *Lewis v Daily Telegraph Ltd* [1964] AC 234 *Minister for Immigration and Border Protection v SZVFW*

	(2018) 264 CLR 541 *Mirror Newspapers Limited v Harrison* (1982) 149 CLR 293; *Capital & Counties Bank v Henty* (1882) 7 App Cas 741 *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 *Monroe v Hopkins* [2017] 4 WLR 68 *Plato Films Ltd v Speidel* [1961] AC 1090 *Stocker v Stocker* [2019] UKSC 17; [2020] AC 593 *Trkulja v Google LLC* (2018) 263 CLR 149 *Warren v Coombs* (1979) 142 CLR 531
Division:	General Division
Registry:	New South Wales
National Practice Area:	Other Federal Jurisdiction
Number of paragraphs:	80
Date of hearing:	3 May 2022
Counsel for the Appellant:	Mr P Gray SC and Mr B Dean
Solicitor for the Appellant:	O'Brien Criminal and Civil Solicitors
Counsel for the Respondent:	Mr N Ferrett QC and Mr H Clift
Solicitor for the Respondent	Baker McKenzie

ORDERS

NSD 1333 of 2021

BETWEEN:	**SHANE BAZZI** Appellant
AND:	**CRAIG PETER DUTTON** Respondent

ORDER MADE BY:	**RARES, RANGIAH AND WIGNEY JJ**
DATE OF ORDER:	**17 MAY 2022**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. Order 1 made on 8 December 2021 be set aside and in lieu thereof it be ordered that:
    1. The proceeding be dismissed.
3. On or before 24 May 2022 each party file and serve any evidence and written submissions limited to 3 pages on which he proposes to rely on the question of costs of the proceeding below and on appeal.
4. On or before 31 May 2022 each party file and serve any evidence and submissions limited to 2 pages in reply.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

RARES AND RANGIAH JJ:

1 At about 11:51pm on 25 February 2021 the appellant, Shane **Bazzi**, published a **tweet** on Twitter about the then Minister for Home Affairs, the Hon Peter **Dutton** MP. The tweet was:

2 The primary judge found that the tweet that conveyed the **imputation** that Mr Dutton excuses rape and that Mr Dutton was entitled to damages of $35,825, inclusive of interest, for the publication to 1,221 readers of the tweet while it remained on Twitter until about 9 April 2021. His Honour also rejected Mr Bazzi's defences of honest opinion under s 31 of the *Defamation Act 2005* (NSW) and fair comment on a matter of public interest at common law and there is no challenge to these findings.

3 The sole issue in Mr Bazzi's appeal is whether the primary judge erred in finding that the tweet conveyed the imputation.

The primary judge's reasons

4 His Honour identified the principles on which to assess whether a matter conveys an imputation about an applicant or plaintiff, and Mr Bazzi accepts that the primary judge did so correctly. In particular, both parties agreed that the judgment of Lord Kerr of Tonaghmore JSC (with whom Lord Reed DPSC, Lady Black, Lord Briggs and Lord Kitchin JJSC agreed) in *Stocker v Stocker* [2020] AC 593 provides useful guidance as to the approach to evaluating whether a tweet, Facebook post or other social media publication conveyed an imputation.

5 The primary judge noted that it was common ground that the ordinary reasonable **reader** of the tweet would have understood the photograph of Mr Dutton, the use of the masthead "*The Guardian*" and the words below those to be a link to an article in *The Guardian* (collectively ***The Guardian* material**).

6 His Honour referred to the contemporaneous controversy that had developed prior to the publication of the tweet about an allegation of rape made public on 15 February 2021 by Ms Brittany **Higgins**. She was a staff member of the then Minister for Defence (Senator the Hon Linda Reynolds CSC) and claimed that she had been raped by another Ministerial staff member in Senator Reynolds's ministerial office in Parliament House, Canberra, on 23 March 2019.

7 The Australian Federal **Police** had informed Mr Dutton of the allegations in the morning of 11 February 2021 on an "in confidence" basis. Initially, Mr Dutton had considered it appropriate to maintain the confidentiality of the briefing, but on 12 February 2021 directed his staff to inform the Prime Minister's office of the allegations, which, he said, the Police had not reported in "she said, he said, details".

8 His Honour found that after Ms Higgins's allegations became public they attracted widespread attention, including, *first*, questions on 15 February 2021 in the Parliament directed to the Prime Minister, the Hon Scott Morrison MP, about the Government's response to the allegations and, *secondly*, discussions elsewhere involving Mr Dutton about who in the Government knew what and when he or she knew about the allegations.

9 Earlier, on 25 February 2021, before Mr Bazzi published the tweet, Mr Dutton gave a "doorstop" interview. His office issued a transcript of that interview and it was reported in the news media that day. Senator Larissa Waters issued a press release that criticised Mr Dutton's

comments. His Honour found that statements that Mr Dutton had made in relation to aspects of Ms Higgins's allegations became one of the political issues of that day.

10 The primary judge found that, in a general way, Mr Dutton's statements and the media coverage of them on 25 February 2021 formed part of the context in which, near midnight on 25 February 2021, Mr Bazzi published the tweet. His Honour noted that Mr Bazzi's submissions (made by senior counsel who has not appeared on the appeal) did not identify in any specific way how that context could affect the understanding of the ordinary reasonable reader of the tweet, particularly in relation to the expressions "apologist" and "rape apologist".

11 His Honour set out the dictionary definitions of what he said was the "relevant meaning" of each of "condone" and "excuse", being the verbs that Mr Dutton had pleaded in the four imputations on which he relied, namely that Mr Dutton:

(a) condones rape;

(b) excuses rape;

(c) condones the rape of women; and

(d) excuses the rape of women.

12 He found that the two variant imputations (c) and (d) did not differ in substance from the other two. After considering the dictionary meanings of "condone" and "excuse", his Honour observed that there was relatively little difference between them other than that "condone" sometimes has a connotation of "tacit approval" which the verb "excuse" does not. He used the definition of "excuse" in the *Macquarie Dictionary* of "to regard or judge with indulgence; pardon or forgive; overlook (a fault etc)". The primary judge noted that Mr Bazzi had relied on Lord Kerr JSC's warning in *Stocker* [2020] AC at 601–602, [24]–[25] as to the need for caution in resorting to a dictionary definition to determine what meaning a publication using a particular word conveyed.

13 Next, his Honour set out definitions of "apologist" from seven dictionaries and stated, as a confirmation of his understanding of its meaning:

> The common meaning in these definitions is that **an apologist is one who speaks or writes in defence of someone or something.** This meaning is consistent with the incorporation into the English language of the Latin word "apologia" to denote the formal defence or justification in speech or writing, as of a cause or doctrine. John Henry Newman's "*Apologia Pro Vita Sua*" is a well-known example of an apologia.

14 The primary judge reasoned that while the tweet had to be read as a whole, the reader would have understood, *first*, its opening line as "a pithy statement of what Mr Bazzi sought to convey and as being his contribution to the 'conversation'" and, *secondly*, the material below it was a link to *The Guardian* and not Mr Bazzi's words. His Honour found that the reader would have understood "apologist" in the tweet in its normal meaning. He rejected Mr Bazzi's argument that, read in context and as a whole, the tweet conveyed that Mr Dutton "lacks empathy or sympathy towards those women on Nauru who reported that they had been raped".

15 His Honour found at [62]:

> For these reasons, I do not accept the submission of Mr Bazzi's counsel as to the way in which the Tweet would have been understood. I consider that the ordinary reasonable reader would have understood Mr Bazzi to be asserting that Mr Dutton was a person who excuses rape, and that the attached link provided support for that characterisation of him. I am not satisfied that the same reader would have understood Mr Bazzi to be saying that Mr Dutton "condoned" rape, given the connotation in that statement that Mr Dutton tacitly approved of rape. The ordinary reasonable reader would not have understood Mr Bazzi as conveying such an extreme statement.

Mr Bazzi's submissions

16 Mr Bazzi argued that that the primary judge erred in reading the tweet as if it were in two distinct parts, one conveying Mr Bazzi's contribution and the other a separate or supplementary message, rather than reading the tweet as whole. He contended that his Honour erred by approaching, *first*, the content of tweet as if Mr Bazzi's **six word statement**, "Peter Dutton is a rape apologist" at its commencement was its main or most important part, to which the balance was subsidiary and, *secondly*, the meaning that it conveyed as "what Mr Bazzi sought to convey" in those six words, shorn of the significance of the material below them. He submitted that the reader would understand the tweet as a whole, having regard to the contemporaneous context, to be conveying that Mr Dutton is someone who makes statements about rape of the kind in *The Guardian* material and, that those statements did not suggest that he excused rape. Mr Bazzi argued that *The Guardian* material did not convey that Mr Dutton excused rape, but rather that he had accused some women of making false claims of rape in order to achieve their object of escaping from refugee centres on Nauru and gaining entry into Australia. He contended that, if the tweet were read as a whole, the reader would have used *The Guardian* material together with the six word statement to discern that the criticism was directed at Mr Dutton's remarks about some women making false allegations of rape to obtain a migration outcome.

17 Mr Bazzi submitted that his Honour erred in using the dictionaries and Cardinal Newman's 19th century *Apologia Pro Vita Sui* to arrive at meanings of the imputations of "apologist", particularly in the circumstance that that word was used in the phrase "rape apologist" and had to be understood in the context of the tweet read as a whole. He argued that the primary judge focussed on the word "apologist" rather than the cognate expression "rape apologist" and failed to explain how the ordinary reasonable reader would have arrived at the imputation when it did not reflect the ordinary and natural meaning of the tweet as a whole or the word "apologist".

18 Mr Bazzi also argued that his Honour twice observed in his reasons that, although Mr Bazzi had not given evidence, it was likely that he had used a term without an appreciation of the actual meaning it conveyed, albeit that, as the primary judge also said, a publisher's intention is irrelevant to the meaning his, her or its publication conveys to the ordinary reasonable reader, listener or viewer.

19 Mr Bazzi contended that the primary judge also erred because he had focussed on the meaning that Mr Bazzi suggested that the tweet conveyed and, having rejected that meaning, simply accepted the imputation as pleaded.

Mr Dutton's submissions

20 Mr Dutton argued that the primary judge was correct. He contended that a tweet had to be evaluated as a user of Twitter would understand it as explained in *Stocker* [2020] AC 593, which was a different approach to that in evaluating traditional news media publications. He submitted that the reader would know that a tweet is limited to 280 characters and that the primary message that the matter complained of conveyed was contained in Mr Bazzi's six word statement. He contended that the reader could give extra weight to Mr Bazzi's own words which were in a prominent position in the tweet. He submitted that the "statement that someone is a rape apologist shorn of any modifying context is at least a statement that the person excuses rape". He argued that Mr Bazzi's use of *The Guardian* material, as suggesting that Mr Dutton was sceptical of some allegations of rape, to support his argument that it modified the meaning conveyed by the six word statement could not stand scrutiny. That was because scepticism of allegations of rape concerned a different subject matter to excusing rape. He asserted that this distinction supported his argument that the tweet should be understood as comprised of two parts relating to separate subject matters, namely, *The Guardian* material and Mr Bazzi's six word statement.

21 Mr Dutton contended that the primary judge was aware of the limited role for, and did not misuse, the dictionary definitions. He submitted that Mr Bazzi had not explained how or why the external context of contemporaneous events could affect whether any imputation was conveyed.

What is the correct test for detecting error on appeal as to a finding about whether an imputation was conveyed?

22 Both parties agreed that this Court is in as good a position as the primary judge in determining whether the tweet conveyed the imputation for the purpose of determining whether his Honour erred in arriving at his finding that it did: *Warren v Coombs* (1979) 142 CLR 531 at 551 per Gibbs ACJ, Jacobs and Murphy JJ. That conforms to the approach taken in *Fleming v Advertiser-News Weekend Publishing Co Pty Ltd* [2016] SASCFC 109 at [32]–[33] per Vanstone, Nicholson and Bampton JJ, *Lesses v Maras* (2017) 128 SASR 292 at 305–306 [70]–[72] per Blue, Parker and Hinton JJ and *Bailey v WIN Television NSW Pty Ltd* (2020) 104 NSWLR 541 at 550–551 [43]–[50] per Simpson AJA with whom Meagher JA agreed (and, White JA appears to have applied the same approach, albeit he arrived at the opposite conclusion).

23 Both parties submitted that the Court of Appeal of the Supreme Court of Victoria in *Gatto v Australian Broadcasting Corporation* [2022] VSCA 66 at [46]–[52] erred in its *obiter dicta* about the nature of an appeal by way of rehearing in a defamation proceeding in relation to whether an imputation is conveyed by a matter complained of. Beach, Walker and Macaulay JJA sought to rely on the approach that Gageler J discussed in *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 563 [48]–[49], saying at [52]:

> On the other hand, as Gageler J observed, there may be categories of cases where other considerations affect the standard of judicial review. In our opinion, defamation law is such a category, by reason of its unique and somewhat artificial mode of analysis. The ultimate conclusion as to the single meaning conveyed by the publication is derived as a matter of impression, by choosing an answer between or among a range of legitimate and reasonable answers (being those imputations the publication is capable of conveying). [That is so even though, in the present case, the issues were presented to the trial judge in a binary manner]. Thus, the legal criterion applied has features that tolerate a range of outcomes. For that reason, we consider that, **while we have not had the benefit of full argument**, the better view is that in a defamation trial by judge alone, the appropriate standard of review by an appellate court of the trial judge's determination of the single meaning of the publication is to be approached by reference to the *House v The King* [(1936) 55 CLR 499] standard. In that context, the question is not whether this Court has formed a different view from that of the trial judge, but whether the trial judge's determination was reasonably open.

(emphasis added)

24 We also did not have full argument on this question. However, *SZVFW* 264 CLR 541 concerned a trial judge's finding that the decision of the administrative decision-maker was legally unreasonable. The Court held that such a judicial decision did not attract the principles in *House v The King* (1936) 55 CLR 499 (*SZVFW* 264 CLR at 552 [18] per Kiefel CJ, 565–566 [55] per Gageler J, 574–575 [85]–[87] and 580 [117] per Nettle and Gordon JJ, 593–594 [154]–[155] per Edelman J). Rather, the Court held that such a decision was susceptible of only one answer, namely whether the administrative decision was, or was not, legally unreasonable.

25 The question whether a publication conveys an imputation is equally one that requires a tribunal of fact, be it judge or jury, to decide objectively. The question for decision is whether an ordinary reasonable reader, listener or viewer would understand that the publication conveys the alleged imputation. The test uses the objective standard of reasonableness, based on how that hypothetical person would understand the matter complained of.

26 If the observations in *Gatto* [2022] VSCA 66 at [52] were correct, an appeal in an action based on negligence (namely what a reasonable person would do in the circumstances) would also fall within the *House v The King* 55 CLR 499 principles. In my opinion, the better view is that in an appeal by way of rehearing under s 27 of the *Federal Court of Australia Act 1976* (Cth), from a finding that an imputation is, or is not, conveyed by a publication, the Court must have regard to the evidence given in the proceeding from which the appeal arises and "has power to draw inferences of fact" in accordance with the principles that Bell, Gageler, Nettle and Edelman JJ stated in *Lee v Lee* (2019) 266 CLR 129 at 148–149 [55]. In such a case, as Gibbs ACJ, Jacobs and Murphy JJ had held earlier in *Warren* 142 CLR at 551, an appellate court must decide whether or not it conveyed an imputation on "the proper inferences to be drawn from facts which are undisputed", being the publication complained of, by applying the well understood legal test of how an ordinary reasonable reader, listener or viewer would understand it.

27 In *Chau v Australian Broadcasting Corporation* (2021) 386 ALR 36 at 46 [34] and [36], Rares J explained the objective nature of the evaluation by a tribunal of fact as to how an ordinary reasonable reader would understand a matter complained of:

> [34] The cases have been concerned to formulate an objective, but reasonably adaptive, construct to encapsulate all of the characteristics of the ordinary reasonable viewer (or reader or listener, depending on the medium of publication). When almost all

> defamation actions in the nation's four most populous States were tried by jury, Brennan J (with whom Gibbs CJ, Stephen, Murphy and Wilson JJ agreed), in *Readers Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at 505–506, explained how jurors needed to approach their task in deciding whether a particular meaning was conveyed by a publication. He said (at 506):
>
> > Whether the alleged libel is established depends upon **the understanding of the hypothetical referees who are taken to have a uniform view of the meaning of the language used, and upon the standards, moral or social, by which they evaluate the imputation they understand to have been made. They are taken to share a moral or social standard by which to judge the defamatory character of that imputation** (*Byrne v. Deane* ([1937] I KB 818, at 833), being a standard common to society generally (*Miller v. David* ((1874) LR 9 CP 118); *Myroft v. Sleight* ((1921) 90 LJ KB 883); *Tolley v. J.S. Fry & Sons Ltd.* ([1930]1 K.B. 467, at 479).
> >
> > (emphasis added)
> >
> > …
>
> [36] The essential characteristics of the "hypothetical referees" are that they are, *first*, ordinary members of the community, *secondly*, reasonable people and *thirdly*, the reflex of how such persons would have understood the publication complained of when and in the circumstances they saw, read or listened to it.

28 The determination of whether a publication conveys an imputation is an objective fact (as distinct from the anterior enquiry of whether it is capable of conveying such a meaning which is a question of law: see *Mirror Newspapers Limited v Harrison* (1982) 149 CLR 293; *Capital & Counties Bank v Henty* (1882) 7 App Cas 741 at 776 per Lord Blackburn). There cannot be a range of possible outcomes when a tribunal of fact applies the objective test for determining whether the ordinary reasonable reader, listener or viewer would understand a publication to have conveyed an imputation. A publication either conveys a meaning or it does not. The answer to that question cannot be, like beauty, in the eyes of the beholder.

Consideration – did the natural and ordinary meaning of the tweet convey the imputation?

29 In *Stocker* [2020] AC at 605–606 [41]–[43], Lord Kerr JSC said:

> [41] The fact that this was a Facebook post is critical. The advent of the 21st century has brought with it a new class of reader: the social media user. **The judge tasked with deciding how a Facebook post or a tweet on Twitter would be interpreted by a social media user must keep in mind the way in which such postings and tweets are made and read.**
>
> [42] In *Monroe v Hopkin*s [2017] 4 WLR 68, Warby J at para 35 said this about tweets posted on Twitter:
>
> > "The most significant lessons to be drawn from the authorities as applied to a case of this kind seem to be the rather obvious ones, that **this is a conversational medium; so it would be wrong to engage in elaborate**

> **analysis of a 140 character tweet; that an impressionistic approach is much more fitting and appropriate to the medium; but that this impressionistic approach must take account of the whole tweet and the context in which the ordinary reasonable reader would read that tweet. That context includes (a) matters of ordinary general knowledge; and (b) matters that were put before that reader via Twitter**."
>
> [43] I agree with that, particularly the observation that **it is wrong to engage in elaborate analysis of a tweet**; it is likewise unwise to parse a Facebook posting for its theoretically or logically deducible meaning. The imperative is to ascertain how a typical (ie an ordinary reasonable) reader would interpret the message. That search should reflect the circumstance that this is a casual medium; **it is in the nature of conversation rather than carefully chosen expression; and that it is pre-eminently one in which the reader reads and passes on.**
>
> (emphasis added)

30 In *Trkulja v Google LLC* (2018) 263 CLR 149 at 160–161 [32] Kiefel CJ, Bell, Keane, Nettle and Gordon JJ said of the task of ascertaining the meaning that a publication conveys:

> **…that exercise is one in generosity not parsimony.** The question is not what the allegedly defamatory words or images in fact say or depict but **what a jury could reasonably think they convey to the ordinary reasonable person** (*Favell* [*v Queensland Newspapers Pty Ltd*] (2005) 79 ALJR 1716 at 1719 [6]; 221 ALR 186 at 189 per Gleeson CJ, McHugh, Gummow and Heydon JJ …); and it is often a matter of first impression. **The ordinary reasonable person is not a lawyer who examines the impugned publication over-zealously but someone who views the publication casually and is prone to a degree of loose thinking** (*Morgan v Odhams Press Ltd* [1971] 1 WLR 1239 at 1245; [1971] 2 All ER 1156 at 1162–1163 per Lord Reid). He or she may be taken to "read between the lines in the light of his general knowledge and experience of worldly affairs" (*Lewis* [*v Daily Telegraph Ltd*] [1964] AC 234 at 258 per Lord Reid; *Favell* (2005) 79 ALJR 1716 at 1719–1720 [10]; 221 ALR 186 at 190 per Gleeson CJ, McHugh, Gummow and Heydon JJ), but **such a person also draws implications much more freely than a lawyer, especially derogatory implications** (*Lewis* [1964] AC 234 at 277 per Lord Devlin; *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519 at 573–574 [134] per Kirby J; *Favell* (2005) 79 ALJR 1716 at 1720 [11]; 221 ALR 186 at 190 per Gleeson CJ, McHugh, Gummow and Heydon JJ), and takes into account emphasis given by conspicuous headlines or captions (*Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 at 646 per Aickin J; [*John Fairfax Publications Pty Ltd v*] *Rivkin* (2003) 77 ALJR 1657 at 1661–1662 [26]; 201 ALR 77 at 83 per McHugh J; at 1699 [187] per Callinan J; Favell (2005) 79 ALJR 1716 at 1719 [8]; 221 ALR 186 at 189 per Gleeson CJ, McHugh, Gummow and Heydon JJ). Hence, as Kirby J observed in *Chakravarti v Advertiser Newspapers Ltd* ((1998) 193 CLR 519 at 574 [134]), "[w]here words have been used which are imprecise, ambiguous or loose, **a very wide latitude will be ascribed to the ordinary person to draw imputations adverse to the subject**".
>
> (emphasis added)

31 In *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 the headline of a newspaper article, in large print, stated: "CAPRICE OWNER DECLARED BANKRUPT BY COURT". The owner of the Caprice restaurant was the plaintiff company. The article never referred to the company but reported on a sequestration order made against the estate of the

individual restaurateur associated in the public mind with running the restaurant business. The High Court upheld the verdict of the jury finding that the article was defamatory of the company because, read as a whole, it was capable of conveying, to readers who knew that it was the owner of the restaurant, the imputation that the company was financially insecure. Mason and Jacobs JJ, with whom Gibbs J and Stephen J agreed (at 635), said that the headline, in isolation, was capable of conveying that imputation and so was the article read as a whole (at 640–641). They said (at 642):

> Certainly **the only statement made about the owner is that contained in the headline** and there the expression is "declared bankrupt". But the reader would not necessarily accept the hypothesis that the reference to the owner was an error and might consider that the expression "declared bankrupt" in reality meant in financial difficulties or was insolvent.
>
> (emphasis added)

32 Aickin J agreed with that analysis (at 646) but added, in relation to the large headline, "the emphasis supplied by the publisher is, however, not to be ignored".

33 Of course, while it is always necessary to read a matter complained of as a whole through the eyes of an ordinary reasonable reader, a defamatory imputation can be conveyed by part only of the publication. And, in *Kemsley v Foot* [1952] AC 345 at 355, Lord Porter discussed the question of whether Michael Foot, the editor of *Tribune* which had published an article with the headline "Lower than Kemsley", could rely on a defence of fair comment even though Lord Kemsley and his newspapers were never mentioned again in the article, saying:

> Although the article complained of uses the phrase "Lower than Kemsley," that language is accompanied by an attack on Lord Beaverbrook's papers, and it is at least arguable that the attack is on the Kemsley Press and not on Lord Kemsley's personal character save in so far as it is exhibited in the press for which he is responsible.

34 In this case, the primary judge did not explain in his reasons why the ordinary reasonable reader would have understood that the tweet conveyed the imputation. His Honour's reasons at [62] do not explain how he moved from the meaning of "apologist" that he found at [54] and [55], namely, a person who defends someone or something, to the meaning that Mr Dutton is a person who "excuses rape". His Honour focussed on Mr Bazzi's six word statement but did not examine whether the reader would understand it in the context of the tweet as a whole or by having regard to his earlier finding that the nature of Twitter is that the maximum 280 characters in a tweet enables Twitter users "to provide short comments on the issues of the day and to assume some knowledge by readers of those issues".

35 *The Guardian* material suggested that Mr Dutton was at least sceptical about the allegations of rape by the Nauru women. *The Guardian* material did not convey that Mr Ditton had any view about the crime of rape or about rapists; rather it was focussed on his sceptical response to the women's claims of rape. The remarks attributed to Mr Dutton suggested that he did not accept the truth of the Nauru women's allegations of rape at face value but rather said their claims were a ploy to obtain a favourable migration outcome.

36 In addition, as a matter of general background, the reader would have been aware that the Twitter "conversation" on 25 February 2021 and the issues of that day, included discussion of Ms Higgins's allegations of rape.

37 We reject Mr Bazzi's argument that the reader would understand the tweet having regard to what his Honour set out as the "**external context**" of what had occurred on 25 February 2021, namely how Mr Dutton had dealt with Ms Higgins's allegations or claims of rape and his defence about his handling of those, in particular, his comment that the Police had not given him "the she said, he said details".

38 The external context cannot be referred to in a case such as this to affect the meaning that a publication conveys to a reader. Where a reader has knowledge of an extrinsic fact, that is not within the community's general knowledge, and is not stated in the matter complained of, in order to assert that such knowledge will affect the meaning a publication conveys, an applicant or plaintiff must plead the fact to support an innuendo meaning: *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 280–281 per Lord Devlin. He gave the now well-known example of why the extrinsic fact must be pleaded (at 278):

> I have said that a derogatory implication might be easy or difficult to detect; and, of course, it **might not be detected at all, except by a person who was already in possession of some specific information**. Thus, to say of a man that he was seen to enter a named house would contain a derogatory implication for anyone who knew that that house was a brothel but not for anyone who did not.
>
> (emphasis added)

39 It may be accepted that the reader could have garnered some knowledge that on 25 February 2021 Mr Dutton had made some statements about Ms Higgins and her allegations. However, the external context cannot be used to affect the meaning that the reader would ascertain from reading the tweet because Mr Dutton did not plead any extrinsic facts necessary to be known in order to affect the natural and ordinary meaning of the tweet. Nor can Mr Bazzi

call any unpleaded facts in aid of his argument as to what the reader would understand the tweet to convey.

40 In our opinion, the primary judge erred in his reasoning process because he did not explain how the reader would understand the whole (or any part) of the tweet to convey the imputation. The meaning his Honour found for the word "apologist" was not that of an excuser but of a defender. A person who defends another's position expresses support or justification for it. A person who excuses another or a position explains away or diminishes its significance. Yet his Honour did not give any reason for the conclusion that the reader would have understood the tweet to convey that Mr Dutton excuses rape. The primary judge appears to have approached the question of whether the tweet conveyed the imputation as a binary choice between the meaning he elicited from Mr Bazzi's then counsel and the one Mr Dutton had pleaded. However, that approach did not address whether the imputation, in fact, was conveyed by the tweet.

41 The reader would understand that Mr Bazzi's six word statement was intended to convey a derogatory view of Mr Dutton in connection with what he said about rape. The reader would read on to absorb, in the fleeting way a reader of a tweet does, the content of *The Guardian* material. He or she would notice that its theme is Mr Dutton's scepticism about the Nauru women's claims of rape and his accusation that they had made them for an ulterior purpose. The reader would perceive that the message in the tweet consisted of both parts, Mr Bazzi's six word statement and *The Guardian* material, read together.

42 The question then is what would the reader understand the tweet conveyed about Mr Dutton?

43 By themselves, Mr Bazzi's six words can mean that Mr Dutton defends rape or is a defender of rape. But it is unlikely that such a meaning would occur to the reader, reasonably, from the content of the tweet including *The Guardian* material. The reader would be drawn to the conclusion that the tweet was saying something else and that "apologist" as used in it did not have its literal meaning.

44 However, the quandary in which the reader would be placed, would not warrant him or her drawing an implication that the tweet conveyed that Mr Dutton *excuses* rape. In *Harrison* 149 CLR at 301 Mason J, with whom Gibbs CJ, Wilson and Brennan JJ agreed, said:

> A distinction needs to be drawn between the reader's understanding of what the newspaper is saying and judgments or conclusions which he may reach as a result of his own beliefs and prejudices. **It is one thing to say that a statement is capable of**

> **bearing an imputation defamatory of the plaintiff because the ordinary reasonable reader would understand it in that sense, drawing on his own knowledge and experience of human affairs in order to reach that result**. It is quite another thing to say that a statement is capable of bearing such an imputation merely because it excites in some readers a belief or prejudice from which they proceed to arrive at a conclusion unfavourable to the plaintiff. The defamatory quality of the published material is to be determined by the first, not by the second, proposition. Its importance for present purposes is that it focuses attention on what is conveyed by the published material in the mind of the ordinary reasonable reader.
>
> (emphasis added)

45 We reject Mr Dutton's argument that the six word statement conveyed the imputation in a manner that was independent of the content of the tweet read as a whole. The tweet was not presented to the reader as conveying two separate criticisms of Mr Dutton of the kind Lord Denning discussed in *Plato Films Ltd v Speidel* [1961] AC 1090 at 1142–1143. There, counsel for the publisher argued that the way a plaintiff framed his cause of action could prevent a defence of partial justification so as to entitle him to a verdict despite the real force of the publication. Lord Denning described, and dealt with, that example as follows:

> Suppose a newspaper said of a man: "He has murdered his father, stolen from his mother and does not go to church on Sundays," and the plaintiff brings a libel action complaining only of the imputation that he does not go to church. The defendants, said Mr. Gardiner, cannot justify the major charges of murder and theft, because the plaintiff has not complained of them. They cannot give evidence of them in mitigation of damages because they are only specific instances. What is, then, the position? It would, says Mr. Gardiner, be most unjust that the plaintiff should get damages for the minor matter when, if the jury had had the whole before them, they would have given him nothing. I agree it would. But the answer is that **the defendants**, who had produced such a piece of bathos, **would be entitled, in the apt words of Lord Coke, to "have showed all the words and the coherence of them**," see *Brittridge's Case* [(1602) 4 Co.Rep. 18b, 19b]: and the jury would no doubt only have given one farthing, as they did in *Cooke v. Hughes* [(1824) Ry. & M. 112]. **In those cases the words so "cohered together" that it was necessary for the jury to see all the words in order to make a correct appreciation of their impact.**
>
> (emphasis added)

46 In other words, a claimant can select an imputation on which to sue that is conveyed as part of a more defamatory publication because it conveys a separate and distinct meaning, the availability of which, as an imputation, is not modified or affected by the context. In Gerald Gardiner QC's example in *Speidel* [1961] AC at 1142–1143, the publication would convey three distinct imputations, namely that the claimant, *first*, was a murderer *secondly*, was a thief and *thirdly*, did not go to church, each of which would be actionable. Similarly in *World Hosts* 141 CLR at 642, the reader could draw an implication from the headline that the "Caprice owner" was the company, not the restaurateur who was made bankrupt.

47 At the end of the day, however, it is the general impression created in the mind of the ordinary reasonable reader of a publication that determines whether it conveys one or more imputations of and concerning a claimant. As Lord Devlin said in *Lewis* [1964] AC at 285 "it is the broad impression conveyed by the libel that has to be considered and not the meaning of each word under analysis". Similarly, in considering what a tweet conveys, Lord Kerr JSC cautioned against an elaborate analysis of the tweet or parsing of its content, because the medium has the nature of a conversation in which participants ordinarily correspond without using carefully chosen expressions: *Stocker* [2020] AC at 606 [43].

48 Thus, the two components of Mr Bazzi's tweet would convey to the reader that they were connected. The reader would think that the only reason that *The Guardian* material was part of the tweet was to illustrate, in some way, the point of his polemic denunciation of Mr Dutton as "a rape apologist". The broad impression is that the tweet is derogatory about Mr Dutton. However, the six word statement is anchored to the balance of the tweet. Whatever else it might convey, the ordinary reasonable reader would not gain the impression that it conveyed that Mr Dutton excuses rape. The proposition in the tweet is that Mr Dutton's scepticism about the Nauru women's claims of rape, expressed in *The Guardian* material, makes him, or supports Mr Bazzi's description of him as, a rape apologist. So understood, the tweet in its natural and ordinary meaning, characterises Mr Dutton's scepticism, about the woman's claims, as that of a rape apologist, as opposed to that of a person who excuses the actual crime of rape. The reader would not gain the impression that the tweet conveyed two messages. Rather, he or she would understand that the point that the tweet was conveying was that a "rape apologist" behaves in the way Mr Dutton had in expressing scepticism about the *claims* of rape. That is a far cry from conveying the meaning that he excuses rape itself.

49 Mr Dutton's submissions on the appeal did not articulate how the reader would understand the tweet to convey the imputation. The imputation is not the natural and ordinary meaning of either Mr Bazzi's six word statement, read as a discrete subject within the tweet as a whole, or a combination of all of the contents of the tweet. Whatever the tweet was saying about Mr Dutton defending rape, or otherwise imputing about his attitude to it, as a rape apologist, it is impossible to discern, how the reader reasonably could understand it to convey a meaning that Mr Dutton excuses rape. *The Guardian* material centres on *allegations* of rape, not the actual commission of it. When that material is read with Mr Bazzi's six words, the reader would conclude that the tweet was suggesting that Mr Dutton was sceptical about claims of

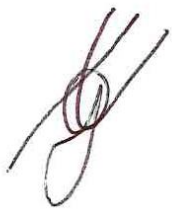
rape and in that way was an apologist. But that is very different from imputing that he excuses rape itself.

Conclusion

50 It is not sufficient that the tweet was offensive and derogatory. Mr Dutton had the onus to establish, on the balance of probabilities, that the reader reasonably would have understood that the tweet conveyed the imputation that he asserted it conveyed. In our opinion, he failed to discharge that onus so that the appeal must be allowed, the judgment entered for Mr Dutton in the sum of $35,825 must be set aside and the proceeding dismissed.

51 Both parties asked to be heard on the issue of costs. That was because Mr Bazzi has raised crowd funding to support the engagement of his lawyers. The parties should file and serve any evidence on which they propose to rely together with written submissions limited to 3 pages within 7 days and any further evidence and written submissions in reply limited to 2 pages within a further 7 days.

I certify that the preceding fifty-one (51) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Rares and Rangiah.

Associate: 

Dated: 17 May 2022

REASONS FOR JUDGMENT

WIGNEY J:

52 The central question raised by this appeal is whether a 'tweet' – a short message appearing on the social media platform Twitter – posted by the appellant, Mr Shane **Bazzi**, conveyed the defamatory imputation that the respondent, the Hon Peter **Dutton** MP, "excuses rape". The primary judge found that the tweet did convey that imputation: *Dutton v Bazzi* [2021] FCA 1474 (**Judgment**). Mr Bazzi contended that his Honour erred in so finding.

53 I agree with Rares and Rangiah JJ that the primary judge erred and that the impugned tweet did not convey the imputation that Mr Dutton excuses rape. Subject to the brief observations that follow, I also substantially agree with their Honours' reasons for so concluding.

54 The tweet, as it appeared to the ordinary reasonable reader of Twitter, is set out in full in the reasons of Rares and Rangiah JJ. The pertinent points about the tweet are: *first*, the words "Peter Dutton is a rape apologist" appear on the first line of the tweet immediately under Mr Bazzi's Twitter handle; *second*, a large photograph of Mr Dutton, a well-recognised public figure, appears immediately underneath the first line – with the words "The Guardian" superimposed on the lower right-hand corner of the photograph; *third*, the words: "Peter Dutton says women using rape and abortion claims as ploy to ge…" and (on the following line) "Home affairs minister says 'some people are trying it on' in an attempt to get to Australia from refugee centres on Nauru" appear below the photograph of Mr Dutton; and *fourth*, a symbol, which appears to resemble a link in a chain, together with the words "the guardian.com", appear immediately under the aforementioned text.

55 It is readily apparent that the tweet comprised both a statement by Mr Bazzi and words and a photograph extracted from an article which had been published in The Guardian, an online news service. It is also tolerably clear that Mr Bazzi's statement was about, or responsive to, the extract from The Guardian article.

56 The primary judge identified the principles that should be applied when assessing whether a publication conveyed a particular defamatory meaning or imputation. There is no suggestion that his Honour's summary of the relevant principles was in any way incorrect. His Honour's reasons, however, reveal that he misapplied those principles in at least three respects.

57 The first error arises from the primary judge's consideration of how the ordinary reasonable Twitter reader would have read Mr Bazzi's tweet. In particular, his Honour unduly focussed on the first six words of the tweet and downplayed the significance of the balance of the tweet, which his Honour referred to as "the link".

58 According to the primary judge, the ordinary reasonable reader would have understood the first six words of the tweet to be Mr Bazzi's contribution – what he "sought to convey" or add to the "conversation" (Judgment [56]) – and that those words were "distinct" from the words in the balance of the tweet (Judgment [57]), which the reader would understand "were not Mr Bazzi's words": Judgment [56]. The opening line of the tweet – which the primary judge characterised as "Mr Bazzi's assessment of Mr Dutton" – would, his Honour reasoned, "have had an effect on the ordinary reasonable reader akin to the effect of the headline to a newspaper article, i.e., as giving an indication of what would be found by following the link": Judgment [58].

59 It followed, according to the primary judge, that the content of "the link" would not have had a significant effect on what the ordinary reasonable reader would have understood to be conveyed by the term "rape apologist" or the word "apologist" in the first line of the tweet. There was, the primary judge found, "no reason for the ordinary reasonable reader to think that the word 'apologist' was being used with other than its ordinary meaning" (Judgment [57]) and no basis for the Court to suppose "that the ordinary reasonable readers would, by reason of the content of the link, have understood the term 'rape apologist' was used with an idiosyncratic meaning": Judgment [59].

60 It was wrong for the primary judge, in analysing whether Mr Bazzi's tweet conveyed the alleged imputation, to dissect and segregate the tweet in the way he did. It was also wrong for his Honour to treat the opening line of the tweet as being akin to a headline in a newspaper article.

61 Twitter is a "conversational medium" which is appropriately analysed by way of an "impressionistic approach" that takes into account "the whole of the tweet and the context in which the ordinary reasonable reader would read that tweet", including "matters of ordinary general knowledge" and "matters that were put before that reader via Twitter": ***Monroe*** *v Hopkins* [2017] 4 WLR 68 at [35] (Warby J), referred to with approval in ***Stocker*** *v Stocker* [2019] UKSC 17; [2020] AC 593 at [42] (Lord Kerr). It is "wrong to engage in elaborate analysis of a tweet" because, like other social media platforms such as Facebook, it is "a casual

medium; it is in the nature of conversation rather than carefully chosen expression" and is "pre-eminently one in which the reader reads and passes on": *Stocker* at [43] (Lord Kerr).

62 The ordinary reasonable Twitter reader would not parse and deconstruct Mr Bazzi's tweet in the way the primary judge did. They would not pause and reflect on each word, but would read the tweet quickly and scroll on to the next tweet. The broad and overall impression that the ordinary reasonable reader would have gleaned from the tweet is that Mr Bazzi was passing on content from an article in The Guardian about something that Mr Dutton had said, along with his comment or observation on that topic. Mr Bazzi was in effect saying, in respect of the extract from The Guardian article: "See what Peter Dutton has said – he is a rape apologist". The ordinary reasonable Twitter reader was, in all the circumstances, highly unlikely to have considered Mr Bazzi's comment or observation to be akin to a newspaper headline which simply gave an indication of what the reader would find by following the link. Rather, the reader would understand that Mr Bazzi's comment was specifically directed at, and directly responsive to, the content of the article which had been extracted in the tweet. The content of the tweet was inextricably linked.

63 It follows that Mr Bazzi's comment in the first line of the tweet must be understood in the context of what is conveyed by the words (and image) in the extract from The Guardian article, not as something distinct or separate to it. The ordinary reasonable reader, scrolling quickly through his or her Twitter feed, would consider the tweet as a whole and would have read and understood Mr Bazzi's comment in the first line having regard to the material that appeared as part of the incorporated extract from The Guardian article. The incorporated extract was as much a part of the tweet as the first line. It was not in some way subsidiary to, or of lesser significance than, Mr Bazzi's comment. It was wrong for the primary judge to downplay the significance of the incorporated words from The Guardian article and his Honour's statement, in that context, that there was "no reason for the ordinary reasonable reader to think that the word 'apologist' was being used with other than its ordinary meaning" (Judgment [57]) is, with respect, a *non sequitur*.

64 It should perhaps also be noted that, as Warby J pointed out in *Monroe*, it is also necessary to have regard to the context in which the ordinary reasonable reader would have read the tweet in question, including matters of general knowledge. The context in which the ordinary reasonable reader would have read Mr Bazzi's tweet included the public and political discussion and debate that was occurring at the time the tweet was posted. That discussion and

debate centred on claims made by a member of staff of a Minister in the Commonwealth government that she had been raped by another staff member in a ministerial office in Parliament House. Mr Dutton was part of that discussion and debate because he had been briefed about the allegation by the Australian Federal Police, but had not immediately informed the Prime Minister about the allegation. Mr Dutton was reported, in that context, to have said that he had not been provided with the "she said, he said" details of the allegation. The ordinary reasonable reader would have understood that Mr Bazzi's tweet was engaging with Mr Dutton's input in that public discussion and debate.

65 The second error by the primary judge relates to his Honour's analysis of the tweet by reference to the meaning of individual words used in the tweet. His Honour's analysis and interpretation of the tweet was, it appears, overly influenced by dictionary definitions, not only of words used in the tweet, but also words used in the pleaded imputations. Such an approach is inconsistent with the "impressionistic approach" which is appropriate when considering the meaning conveyed by a tweet. It is entirely unrealistic to think that ordinary reasonable readers of tweets pause and reflect on the precise dictionary definitions of words used in a tweet.

66 The primary judge's overreliance on dictionary definitions is demonstrated not just by the detailed and elaborate references to the dictionary definitions and etymological origin of the word "apologist": Judgment [54]. Rather, his Honour's conclusion that the tweet conveyed the alleged imputation that Mr Dutton excuses rape can, in some respects, only be explained or understood by reference to dictionary definitions. His Honour first focussed on the ordinary meaning of the word "apologist". His Honour gleaned from numerous dictionary definitions that "the term 'apologist' means a person who defends someone or something": Judgment [54]. It is important to note, in this context, that none of the dictionary definitions of the word "apologist" identified by the primary judge refer to the word "excuse" or suggest that an apologist is someone who "excuses" someone or something. His Honour's summary of the meaning of "apologist" also excluded what appears to be a further or alternative element of the dictionary definitions: that an apologist is someone who apologises or makes an apology in speech or writing.

67 While the primary judge initially determined that an "apologist" is a person who defends someone or something, his Honour subsequently concluded, in effect, that an apologist is a person who excuses someone or something – that the ordinary reasonable reader would have understood that in asserting that Mr Dutton was a "rape apologist", Mr Bazzi was asserting that

Mr Dutton was a person who "excuses rape": Judgment [62]. How did his Honour get from "defends" to "excuses" when it came to the use and meaning of the word apologist in the tweet? The answer to that question is not entirely clear, but it appears that his Honour may have reached that conclusion having regard to the dictionary definition of "excuse". His Honour had regard to the dictionary definition of "excuse" when considering the meaning of the pleaded imputations. The dictionary definition of "excuse" selected by his Honour was that provided in the Macquarie Dictionary: "to regard or judge with indulgence; pardon or forgive; overlook (a fault etc)": Judgment [44]. His Honour also had regard to the dictionary definition of "condone" because that word was used in one of the other pleaded imputations. His Honour noted that, in common parlance, the word "condone" sometimes has a connotation of "tacit approval": Judgment [44].

68 In concluding that the tweet conveyed that Mr Dutton excuses rape, the primary judge appears to have returned to the dictionary definitions of "excuse" and "condone" because his Honour indicated that he was not satisfied that the tweet conveyed the more "extreme statement" that Mr Dutton tacitly approved rape: Judgment [62]. His Honour was therefore not satisfied that the tweet carried the imputation that Mr Dutton "condones" rape. It should be noted, however, that even the dictionary definition of "excuse" referred to by the primary judge does not include "defend". Nor does it otherwise align with the various dictionary definitions of the word "apologist". It accordingly remains somewhat of a mystery how the primary judge, having first considered that an apologist is someone who defends something or someone, arrived at the conclusion that an apologist is someone who excuses something or someone.

69 The primary judge was aware of the need for caution in applying dictionary definitions in the ascertainment of defamatory meaning: Judgment [50]. In *Stocker*, Lord Kerr made it plain that, in the context of ascertaining the meaning of a defamatory statement in a social media post, the meaning "is not fixed by technical, linguistically precise dictionary definitions, divorced from the context in which the statement was made": *Stocker* at [25]. It appears, however, that the primary judge failed to heed that warning, or failed to approach the dictionary definitions with sufficient caution.

70 It should finally be noted in relation to the use of dictionary definitions that there is some merit in Mr Bazzi's submission that it was wrong for his Honour to fix on the meaning of "apologist" in circumstances where the tweet uses the composite expression "rape apologist". The ordinary

reasonable reader of Twitter would not necessarily have understood that the meaning of the composite expression "rape apologist" was the mere sum of its parts: "rape" and "apologist".

71 The primary judge's undue focus on dictionary definitions, especially the dictionary definitions of the word "apologist", underlines his Honour's failure to take an "impressionistic approach" and properly consider the first six words of the tweet in the context of the tweet as a whole. His Honour instead appears to have parsed the tweet for it's "theoretically or logically deducible meaning" (cf *Stocker* at [43]) by reference to the meaning of individual words in the first line of the tweet.

72 The third error in the primary judge's approach to divining the meaning conveyed by the tweet is that his Honour appeared to approach the issue as if it involved a binary choice between the meaning alleged by Mr Dutton and the alternative meaning postulated by Mr Bazzi's counsel in argument during the trial. It was a matter for Mr Dutton to demonstrate, on the balance of probabilities, that the tweet conveyed the meaning or meanings alleged by him. The primary judge's reasoning and conclusion appear to hinge to a large extent on his rejection of the alternative meaning advanced by Mr Bazzi's counsel, which his Honour considered to be "idiosyncratic": Judgment [59]-[61]. The problem is that the rejection of the postulated alternative meaning did not necessarily compel the conclusion that the tweet conveyed the meaning alleged by Mr Dutton.

73 That is not to say that it was not appropriate for the primary judge to grapple with the question of what meaning the tweet in question would have conveyed to the ordinary reasonable Twitter reader. But the question at the end of the day was whether the tweet conveyed the imputation that Mr Dutton excuses rape.

74 Putting the primary judge's erroneous approach and reasoning to one side, that question is also the essential question raised by this appeal. Did Mr Bazzi's tweet convey to the ordinary reasonable reader that Mr Dutton excuses rape?

75 The answer to that question is not entirely straightforward. The tweet is confounding and the meaning conveyed by it is somewhat obscure. That is because there is an element of disjunct or disconnect between the assertion that "Peter Dutton is a rape apologist" and the incorporated extract from The Guardian article which reported what Mr Dutton had apparently said about rape claims that had been made by some women in refugee centres on Nauru.

76 The statements made by Mr Dutton, as reported in The Guardian article, would perhaps have supported a statement or comment that Mr Dutton was dismissive or sceptical about rape claims, or that he was not empathetic in respect of rape claims or claimants. It is, however, difficult to reconcile the reported statements, or the inferences that might be drawn from them, with Mr Bazzi's assertion that Mr Dutton was a "rape apologist". Even if it is accepted that the ordinary meaning of "apologist" is a person who defends someone or something, that would tend to suggest that to say that someone is a "rape apologist" is to say that they defend the act of rape. That is materially different to accusing someone of being dismissive or sceptical of rape claims, or lacking empathy towards people who claim to have been raped.

77 While it is somewhat difficult in those circumstances to ascertain what the tweet would have conveyed to the ordinary reasonable Twitter reader, I am on balance not persuaded that the tweet conveyed to the ordinary reasonable reader that Mr Dutton excuses rape. To excuse rape is to seek to somehow justify, pardon, overlook or perhaps trivialise the act of rape. When approached in an impressionistic manner, and taking into account the whole tweet and the context in which it was posted, I do not accept that the tweet conveys, or would have conveyed, to the ordinary reasonable reader that Mr Dutton is a person who has that approach or attitude to the act of rape.

78 The tweet no doubt conveys an impression that is derogatory and critical of Mr Dutton's attitude to rape or rape allegations, but it does not go so far as to convey the impression that Mr Dutton is a person who excuses rape. That is so even if it be accepted that the word "apologist" may, depending on the context in which it is used, convey that the person to whom that label is attached is a person who defends someone or something. The tweet does not, when considered as a whole and in context, convey the impression that Mr Dutton defends the act of rape. It may, particularly when read in the context of the discussion and debate which was occurring at the time concerning the specific rape allegation referred to earlier, have conveyed that Mr Dutton may on occasion be dismissive of rape claims, or lack empathy towards people who make rape claims. That again, however, is different to defending or excusing the act of rape.

79 The primary judge erred in finding that Mr Bazzi's tweet conveyed the defamatory imputation that Mr Dutton excuses rape. That imputation was not conveyed by the tweet. The appeal must accordingly be allowed.

80 I agree with the orders proposed by Rares and Rangiah JJ, including those in respect of the question of costs.

I certify that the preceding twenty-nine (29) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Wigney.

Associate: 

Dated: 17 May 2022